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(2) Appeals will be reviewed by the Information Access Branch Chief who may consult with other officials of the Department as appropriate. The requester will be notified within thirty working days from the date on which the Department received the appeal.

[52 FR 32126, Aug. 26, 1987]

§ 171.16 Predisclosure notification procedures for confidential commercial information.

(a) *In general.* Confidential commercial information provided to the Department shall not be disclosed pursuant to a Freedom of Information Act request except in accordance with this section. For purposes of this section, the following definitions apply:

(1) *Confidential Commercial Information* means records provided to the Department by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) *Submitter* means any person or entity who provides confidential commercial information to the Department. The term *submitter* includes, but is not limited to, corporations, state governments, and foreign governments.

(b) *Notice to submitters.* Whenever the Department receives a Freedom of Information Act request for confidential commercial information and, pursuant to paragraph (c) of this section, the submitter is entitled to receive notice of that request, the Department shall promptly notify the submitter that it has received the request, unless such notice is excused under paragraph (g) of this section. The notice shall be in writing and either describe the exact nature of the confidential commercial information requested or provide a copy of the records or portion of the records containing the confidential commercial information. The notice shall be addressed to the submitter and mailed, postage prepaid, first class mail, to the submitter's last known address. Where notice is required to be given to a voluminous number of submitters, in lieu of mailing the notice may be posted or published in a man-

ner and place reasonably calculated to provide notice to the submitters.

(c) *When notice required.* (1) For confidential commercial information submitted prior to January 1, 1988, the Department shall provide a submitter with notice of a receipt of a Freedom of Information Act request whenever:

(i) The records are less than ten (10) years old and the information has been designated by the submitter as confidential commercial information; or

(ii) The Department has reason to believe that the disclosure of the information could reasonably be expected to cause substantial competitive harm.

(2) For confidential commercial information submitted to the Department on or after January 1, 1988, the Department shall provide a submitter with notice of receipt of a Freedom of Information Act request whenever:

(i) The submitter has designated the information as confidential commercial information pursuant to the requirements of this section; or

(ii) The Department has reason to believe that the disclosure of the information could reasonably be expected to cause substantial competitive harm.

(3) Notice of a request for confidential commercial information falling within paragraph (c)(2)(i) of this section shall be required for a period of not more than ten (10) years after the date of submission unless the submitter provides reasonable justification for a designated period of greater duration.

(4) A submitter shall use good-faith efforts to designate by appropriate markings, either at the time a record is submitted to the Department or within a reasonable period of time thereafter, those portions of the record which it deems to contain confidential commercial information. The designation shall be accompanied by a certification made by the submitter, its agent or designee, that to the best of the submitter's knowledge, information and belief, the record does, in fact, contain confidential commercial information that theretofore has not been disclosed to the public.

(5) Whenever the Department provides notice to the submitter in accordance with paragraph (c) of this section, the Department shall at the same time

provide written notice to the requester that it has done so.

(d) Opportunity to object to disclosure. To the extent permitted by law, the notice required by paragraph (c) of this section shall afford a submitter a reasonable period of time within which the submitter or its authorized representative may provide the Department with a written objection to the disclosure of the confidential commercial information. The objection shall set forth in detail all grounds for withholding information and demonstrate why the submitter believes that the records contain confidential commercial information. Except where a certification already had been made in conformance with the requirements of paragraph (c)(4) of this section, the objection shall be accompanied by a certification made by the submitter, its agent or designee, that to the best of the submitter's knowledge, information and belief, the record does, in fact, contain confidential commercial information that theretofore has not been disclosed to the public. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the Freedom of Information Act.

(e) *Notice of intent to disclosure.* (1) The Department shall give careful consideration to objections made by a submitter pursuant to paragraph (d) of this section prior to making any administrative determination of the issue. Whenever the Department decides to disclose information over the objection of a submitter, the Department shall forward to the submitter a written notice which shall include:

(i) A statement of the reasons for which the submitter's disclosure objections were not sustained;

(ii) A description of the information to be disclosed; and

(iii) A specified disclosure date.

(2) To the extent permitted by law, the notice required to be given by paragraph (e)(1) of this section shall be provided to the submitter a reasonable number of days prior to the specified disclosure date.

(3) Whenever the Department provides notice to the submitter in accordance with paragraphs (e)(1) and (e)(2) of this section, the Department shall at

the same time notify the requester that such notice has been given and the proposed date for disclosure.

(f) *Notice of lawsuit.* Whenever a requester brings suit seeking to compel the disclosure of information for which notice is required pursuant to paragraph (c) of this section, the Department shall promptly notify the submitter that such suit has been filed.

(g) *Exceptions to notice requirements.* The notice requirements of this section shall not apply if:

(1) The Department determines that the information should not be disclosed;

(2) The information has been published or has been officially made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(4) Disclosure of the information is required by a Department rule that:

(i) Was adopted pursuant to notice and public comment;

(ii) Specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act; and

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(5) The information requested was not designated by the submitter as exempt from disclosure in accordance with paragraph (c) of this section, when the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the Department has substantial reason to believe that the disclosure of the information would result in competitive harm; or

(6) The designation made by the submitter in accordance with paragraph (c) of this section appears obviously frivolous; except that, in such case, the Department must provide the submitter with written notice of any final administrative disclosure determination within a reasonably number of

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days prior to the specified disclosure date.

[55 FR 9318, Mar. 13, 1990]

Subpart C—Executive Order 12065 Provisions

§ 171.20 Definitions.

As used in this subpart, the following definitions shall apply:

(a) The term *agency* means Federal agency including department, agency, commission, etc., as defined in 5 U.S.C. 552(e).

(b) The term *classification* refers to the determination that certain information requires protection against unauthorized disclosure in the interest of national security, coupled with the designation of the level of classification: Top Secret, Secret or Confidential.

(c) The term *classification authority* means the authority vested in an official of an agency to originally classify information or material which is determined by that official to require protection against unauthorized disclosure in the interest of national security. It is also the authority to prolong classification.

(d) The term *classified information* means information or material, herein collectively termed information, that is owned by, produced for or by, or under the control of the United States Government, and that has been determined pursuant to Executive Order 12065, prior orders, or other orders or statutes, to require protection against unauthorized disclosure, coupled with the designation of the level of classification.

(e) The term *declassification* refers to the determination that particular classified information no longer requires protection against unauthorized disclosure in the interest of national security. Such determination shall be by specific action or automatically after the lapse of a requisite period of time or the occurrence of a specified event. If such determination is by specific action, the material shall be so marked with the new designation.

(f) The term *document* has the meaning of “record” as set forth in § 171.10(b).

(g) The term *foreign government information* is: (1) Information provided to the United States by a foreign government or international organization of governments in the expectation, express or implied, that the information is to be kept in confidence, or (2) information, requiring confidentiality, produced by the United States pursuant to a written joint arrangement with a foreign government or international organization of governments. A written joint arrangement may be evidenced by an exchange of letters, a memorandum of understanding, or other written record of the joint arrangement.

(h) The term *Presidential appointees* includes former officials of the Department of State or other U.S. Government agencies who held policy positions and were appointed by the President, by and with the advice and consent of the Senate, at the level of Ambassador, Assistant Secretary of State, or above. It does not include Foreign Service Officers as a class or persons who merely received assignment commissions as Foreign Service Officers, Foreign Service Reserve Officers, Foreign Service Staff Officers and employees.

§ 171.21 Identifying information.

For the request to be processed, it must describe the material sufficiently to enable a professional employee of the Department who is familiar with the subject area of the request to locate the record with a reasonable amount of effort. Whenever a request does not reasonably describe the information, the requester shall be notified that unless additional information is provided, or the scope of the request is narrowed, no further action will be taken.

§ 171.22 Access to records.

All classified information except as noted in § 171.23, shall be subject to review for declassification upon request of a member of the public, a government employee, or an agency.

(a) A request for declassification under the Order shall be acted upon within 60 days from the date on which the request reaches the appropriate receiving office.